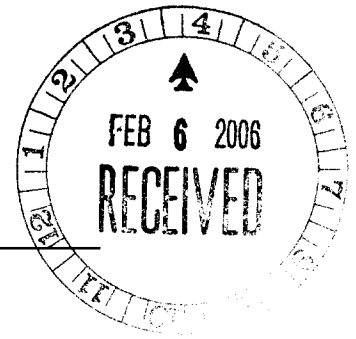


**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB DOCKET NO. AB-290 (Sub- No. 237X)

**NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXEMPTION
ABANDONMENT OF FREIGHT OPERATING RIGHTS AND
OF RAIL FREIGHT SERVICE
BETWEEN BALTIMORE, MD AND COCKEYSVILLE, MD
IN BALTIMORE COUNTY, MARYLAND**

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**MOTION OF JAMES RIFFIN
FOR A PRELIMINARY DETERMINATION**

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Dated: February 6, 2006

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PUBLIC RECORDS

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1. James Riffin ("Riffin"), pursuant to the applicable regulations of the Surface Transportation Board ("STB" or "Board") herewith files this Motion of James Riffin for a Preliminary Determination, requesting that the Board make a preliminary determination with regard to the following matters:

A. Are the freight operating rights, freight operating easement, and the right to provide freight service over the Cockeysville Line, which are the subject of the above entitled proceeding, capable of being assigned to, or purchased by, another party, via an Offer of Financial Assistance?

B. i. Are the rail segments identified on the attached map as (a) Cockeysville Industrial Park; or (b) Hunt Valley Business Park, Line segments, subject to the authority of the Board, or Spur, Industrial, etc. segments, exempted from authority by the Board by 49 USC § 10906?

ii. If Line segments, have these segments been previously approved for abandonment by the Board or the Interstate Commerce Commission?

C. Have the following Cockeyville Line segments been previously approved for abandonment by the Board or the Interstate Commerce Commission?

i. From MP 13.8 (Cockeyville) to MP 16.8 (Western Run)?

ii. From MP 16.8 (Western Run) to MP 35.1 (Maryland / Pennsylvania line)?

D. Does Riffin meet the criteria for a “financially responsible person?”

E. Has Riffin satisfied the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations regarding Riffin’s proposed purchase of the rights which Norfolk Southern desires to abandon, specifically, Norfolk Southern’s Cockeyville Line freight operating rights, freight operating easement, and the right to provide freight service over the Cockeyville Line?

DISCUSSION

A. Are Norfolk Southern’s rights assignable?

2. Riffin filed a Notice of Intent to make an Offer of Financial Assistance to purchase whatever rights Norfolk Southern Railway Company (“NS”) desires to abandon in the above entitled proceeding. Before NS institutes negotiations with Riffin regarding Riffin’s purchase of those rights NS desires to abandon, Riffin would ask that the Board make a determination regarding whether NS’ rights are assignable via an Offer of Financial Assistance.

3. In a February 3, 2006 telephone conversation between Riffin and James Paschall, Senior Attorney for NS, Mr. Paschall raised the issue: Are NS’ freight operating rights, freight operating easement, or exclusive right to provide freight rail service on the Cockeyville Line, assignable?

4. Normally, with the Board's prior approval, these rights would be assignable. Unfortunately, the instant case may not be considered 'normal.' NS acquired its rights in the Cockeysville Line via the purchase of, merger with, that portion of Conrail's assets known as the Pennsylvania Line assets. Furthermore, prior to NS' acquisition of the Cockeysville Line, without prior Board approval, Conrail sold whatever rights it had in the Cockeysville Line right-of-way and track material, to the State of Maryland. Conrail's sell of the Line to the State of Maryland without prior Board approval, raises the issue of residual common carrier obligations.

B. Are the rail segments in the Cockeysville Industrial Park and Hunt Valley Business Park, Line or Spur, Industrial, etc. track?

5. There are dead-end rail segments which branch off of the former Northern Central main line. Near MP 13.0, at Warren Road, a 3 +/- mile branch line goes to the Hunt Valley Business Park. Maryland's light-rail trains follow the main line to MP 13.0, then leave the main line, following the line that went to the Hunt Valley Business Park. Shortly after leaving the main line at MP 13.0, there is another branch line which comes off of the Hunt Valley Business Park line. This line has a mile or so of track, and served a number of former shippers in the Cockeysville Industrial Park. Recently, several of the properties served by the Cockeysville Industrial Park line, were listed for sale. It is unknown if the future buyers of these properties will desire rail service.

6. If these rail segments are spur or industrial track, then per 49 U.S.C. §10906, NS would not need Board approval to abandon these rail segments. If, on the other hand, the Board were to find that these segments are line, and if they are not included in NS' Petition to Abandon, then granting NS' Petition **would strand these segments**. Riffin has a personal interest in the Cockeysville Industrial Park segment, since he has had discussions with the adjacent property owners regarding his use of this segment, and since he has entertained the idea of purchasing one or more of the available properties. (The availability of rail service on this segment, or the lack thereof, will be the prime determinant as to whether Riffin buys one or more of these properties.)

C. Have the main line segments between MP 13.8 and MP 35.1

been previously approved for abandonment?

7. NS' Petition states it is seeking permission to abandon the Cockeysville Line to MP 13.8. On September 11, 1972, the Penn Central Transportation Company filed an application to abandon that portion of the Northern Central Branch between MP 16.8, located at Western Run in Cockeysville, Maryland, and MP 54.6, located in Hyde, Pennsylvania. See AB 5 Sub 106, filed 9/11/1972. The Maryland / Pennsylvania line is at MP 35.1. The Interstate Commerce Commission ("ICC") approved transfer of the Pennsylvania portion of the line to the State of Pennsylvania. In 2003, Riffin attempted to ascertain whether the Interstate Commerce Commission ever approved Penn Central's application to abandon the Maryland portion of the line. Personnel in the Board's archive section were unable to find a decision granting Penn Central permission to abandon that portion of the line between MP 16.8 and MP 35.1.

8. On January 27, 2006, NS sent a Reply to Riffin's Protest to the Board. On page 6 of that Reply, NS admits Conrail's operating rights did extend beyond MP 13.8, and admits it could find no ICC or Board decision granting permission to abandon any segment beyond MP 13.8. NS proposed to rectify this anomaly by filing another Notice of Exemption. If NS' Petition for Exemption were to be granted prior to resolving this anomaly, the line segment beyond MP 13.8 would be stranded, which is undesirable. NS postulated no party would be prejudiced by late filing a Notice of Exemption for that portion of the line beyond MP 13.8. Riffin would strongly disagree with this statement.¹

¹ Two of Riffin's properties are adjacent to this portion of the Line. NS made an attempt to persuade the Board that Riffin is not a 'shipper.' From NS' perspective, Riffin's request to have NS ship 13 rail cars to Riffin in Cockeysville, is not substantial enough to constitute a 'shipper.' In its Reply, NS attempted to excuse its refusal to deliver Riffin's rail cars to him, by arguing the Cockeysville Line was out-of-service, due to MDOT's double-tracking project, and that Riffin did not have access to a rail siding. Shortly after Riffin's rail cars arrived at NS' Bayview yard, in August, 2005, Riffin spoke with the project manager for MDOT's double-tracking project. The project manager informed Riffin that there was a window of opportunity to deliver Riffin's rail cars to him in August, 2005. Riffin called NS' Baltimore terminal superintendent, to advise him of this window of opportunity. Unfortunately, the superintendent did not answer his telephone, nor did he respond to the voice mail Riffin left him. The project manager further informed Riffin that the tracks could be utilized after September 16, 2005. Riffin made repeated telephone calls to the Baltimore Superintendent, Baltimore Train Master, Baltimore Track Maintenance supervisor, and to NS' Central Yard Operations personnel, all in an attempt to persuade NS to deliver Riffin's rail cars to him in Cockeysville. Riffin spoke with several property owners regarding his use of the rail sidings adjacent to their properties. In spite of all of these efforts, NS still refused, and still refuses, to deliver Riffin's rail cars to him. The first excuse was the track was out-of-service due to the double tracking project. The second excuse was

D. Does Riffin meet the criteria for a “financially responsible person?”

9. Riffin has provided the Board with a personal financial statement. The only criteria Riffin could find for a “financially responsible person,” is that found at 49 CFR §1152.27 (c) (1) (ii) (B), which states:

“(B) Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations;”

that Riffin did not have access to a rail siding. The third excuse was that NS did not know what the radius of curvature was of the track at the point where the Hunt Valley Business Park branch line comes off of the main line. An MDOT engineer told Riffin that the curve had a radius of 280 feet. Riffin then passed this information on to NS' Track Maintenance Supervisor. The next excuse, was the segments leading to the rail sidings Riffin had access to, needed cross ties. (Maintenance of these segments is the responsibility of NS. Riffin offered to replace whatever cross ties needed to be replaced. Neither the Track Supervisor nor Terminal Superintendent returned any of Riffin's repeated telephone calls.) The next excuse was NS' train crews had to be re-qualified to use the double-tracked Line, prior to using the Line. The most recent excuse, is NS plans to retroactively embargo the Line. (An embargo is legally justified when a line is rendered unsafe due to an act of God.) MDOT has completed its double-tracking project. The Line is back in revenue service for MDOT. If the Line were unsafe, MDOT would not continue operating its light-rail trains on the Line. The rail sidings Riffin has access to, are not located on the line used by the light-rail trains. If some portion of these non-light-rail Lines is unsafe, that unsafe condition is the direct result of NS' failure to properly maintain the portions of the Line NS is responsible for maintaining, not due to an act of God. Therefore, there is no legal justification to embargo any portion of the Line. In short, there is no legal justification for NS' refusal to deliver Riffin's rail cars to him in Cockeysville. Riffin would **strongly** object to NS' proposal to return Riffin's rail cars to their points of origin. (All of Riffin's rail cars were delivered via other Class I railroads to Chicago, then handed over to NS, to be delivered to Riffin.) NS characterized Riffin's rail cars as being “very old, empty freight cars.” Riffin's six tank cars were rebuilt in 1998, and are certified through 2008. If Riffin is granted permission to purchase NS' Cockeysville Line operating rights, Riffin would make these tank cars available to Imerys, to haul their calcium carbonate slurry in. If not used for that purpose, Riffin could use them to haul corn syrup (their last cargo), which Riffin could utilize in his proposed Cockeysville ethanol manufacturing facility. Riffin's three 89-foot flat cars were built in the 1980's, are in excellent condition, and prior to Riffin's purchase of them, were used for TOFC service. Two of the flat cars have track maintenance equipment on them. (A laser-guided track liner, two large spike-pullers, several 'speeders,' and a stainless steel 200-barrel capacity cement silo with auger.) One car has three large (1,000 HP each) locomotive-size diesel-powered generators on it. Empty, they are not. Riffin's two passenger cars are vintage passenger cars that were rebuilt in the 1990's. One was in active passenger service six weeks prior to Riffin's purchase of the car, has head-end power pass-thru capability, and may be Amtrak certifiable. (It was in active service in Canada, and met Canada's passenger car certification criteria, which are probably similar to Amtrak's criteria.)

10. 49 CFR § 1152.27 (a) (1) (I) indicates the purchase price is to be the “price required to keep the line ... in operation.”

11. Generally, the purchase price is the net liquidation value, which is the sum of the value of the right-of-way plus the scrap value of the rails, minus the cost to remove the rails. In the instant case, NS does not own the right-of-way or rails. Consequently, the net liquidation value is not relevant. In this type of situation, the “going concern value” may suggest what the purchase price should be. NS has indicated it desires to abandon its rights. From this one may conclude the going concern value NS ascribes to the Line is Zero. Another approach may be to consider how profitable the Line has been, then capitalize whatever profit has been earned. NS has indicated the Line frequently has been unprofitable. Thus, there has been no profit to capitalize, which also infers the going concern value may be zero or a negative value.

12. From the above, one may infer to be a financially responsible person, one must have sufficient funds to keep the line in operation. In the instant case, Riffin would not need funds to rehabilitate the Line (it was just rehabilitated). So, the only expenses Riffin would have to cover, would be the per-car charge MDOT charges for moving rail cars over the Line. Presumably, the rate quoted to the shipper to move the car, would include whatever charge MDOT assesses to move the car over its line. Given the above, it would appear Riffin has sufficient resources to keep the line in operation for at least two years. (The period of time Riffin would be prohibited from disposing of the Line.) Consequently, it would appear Riffin is a financially responsible person.

E. Riffin has satisfied the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations to purchase Norfolk Southern’s freight operating rights and easement.

13. If Riffin is a financially responsible person, then Riffin has satisfied the standards of 49 U.S.C. § 10904 (d) for purposes of instituting negotiations to purchase Norfolk Southern’s freight operating rights, freight operating easement, and exclusive freight service provider.

14. In its Reply, NS suggests Riffin has no interest in providing freight service on the Line, that Riffin only desires to operate a dinner or excursion train on the Line. NS’ freight operating

rights permit NS to operate trains on the Line only when the Line is not being used for light-rail purposes, which is between midnight and 5 a.m. To operate a dinner train between midnight and 5 a.m. would be foolish. Most people eat dinner between 5 p.m. and 8 p.m. By midnight, most people are in bed. Consequently, operating an excursion train between midnight and 5 a.m. would also be foolish. Besides, why would anyone want to ride an expensive excursion train in the middle of the night, when they could traverse the same set of rails during day-light hours on the light-rail trains for \$2? To even suggest that the only use Riffin would make of the Line is to use it for dinner train or excursion train purposes, is ludicrous. The only viable use of the Line between midnight and 5 a.m., would be to use the Line for freight-hauling purposes, which is precisely what Riffin proposes to use the Line for.

15. In private conversations with Riffin, two shippers on the Line (Fleischmann's Vinegar and Imerys) have indicated that if freight rail service was available, they would utilize that rail service. Riffin would also use freight rail service if it was available. The shippers are deathly afraid that if they say anything to the Board other than that they do not oppose NS' Petition to abandon, MDOT will cease subsidizing the extra costs associated with moving their products via motor carrier, and will demand that the shippers refund to MDOT all subsidy monies already sent to the shippers. Their agreements with MDOT specify that if the shippers do not file letters with the Board stating that they do not oppose NS' abandonment of its freight operating rights, then MDOT can demand repayment of all subsidy monies given to the shippers (over \$500,000 each to date), and cease all future subsidy payments. The agreements further state that MDOT has the unfettered right to terminate the subsidy agreements, and to terminate all subsidy payments. (MDOT can terminate the agreements even if the shippers do not breach the agreement.) The shippers are afraid that if they make their desires regarding freight rail service, known to the Board, MDOT will retaliate by terminating the subsidy agreements and by demanding repayment of all monies received to date. If MDOT terminated the subsidy agreements and Riffin was not granted permission to acquire the freight operating rights NS desires to abandon, then the shippers would be placed in a most difficult position: They would have no freight rail service, they would have substantial extra costs associated with moving their products via motor carrier, and they would no longer be receiving any subsidy monies from MDOT. The shippers are also concerned about what is going to happen in four years, when the subsidy terminates. At that


point in time, the shippers will have to pay the full costs associated with moving their products via motor carrier. Since no oral hearings were scheduled in this proceeding, and since the shippers are not parties, Riffin cannot use discovery to get testimony from the shippers regarding their desires for freight rail service. The language in the letters the shippers filed with the Board, was prepared by MDOT. The letters state the shippers do not oppose NS' abandonment of its freight operating rights. The shippers are not wedded to any particular rail carrier. They just want freight rail service. If Riffin is granted permission to provide the shippers with freight rail service, they will use it, since rail service is far less costly than moving their products via motor carrier. In addition, freight rail service at their facilities would be far more convenient: They would load / unload their products directly into / out of, rail cars. Without freight rail service at their facilities, the shippers must truck their products to a transload facility in Canton, Baltimore City, Maryland, then load / unload their products into a rail car.

Respectfully submitted,

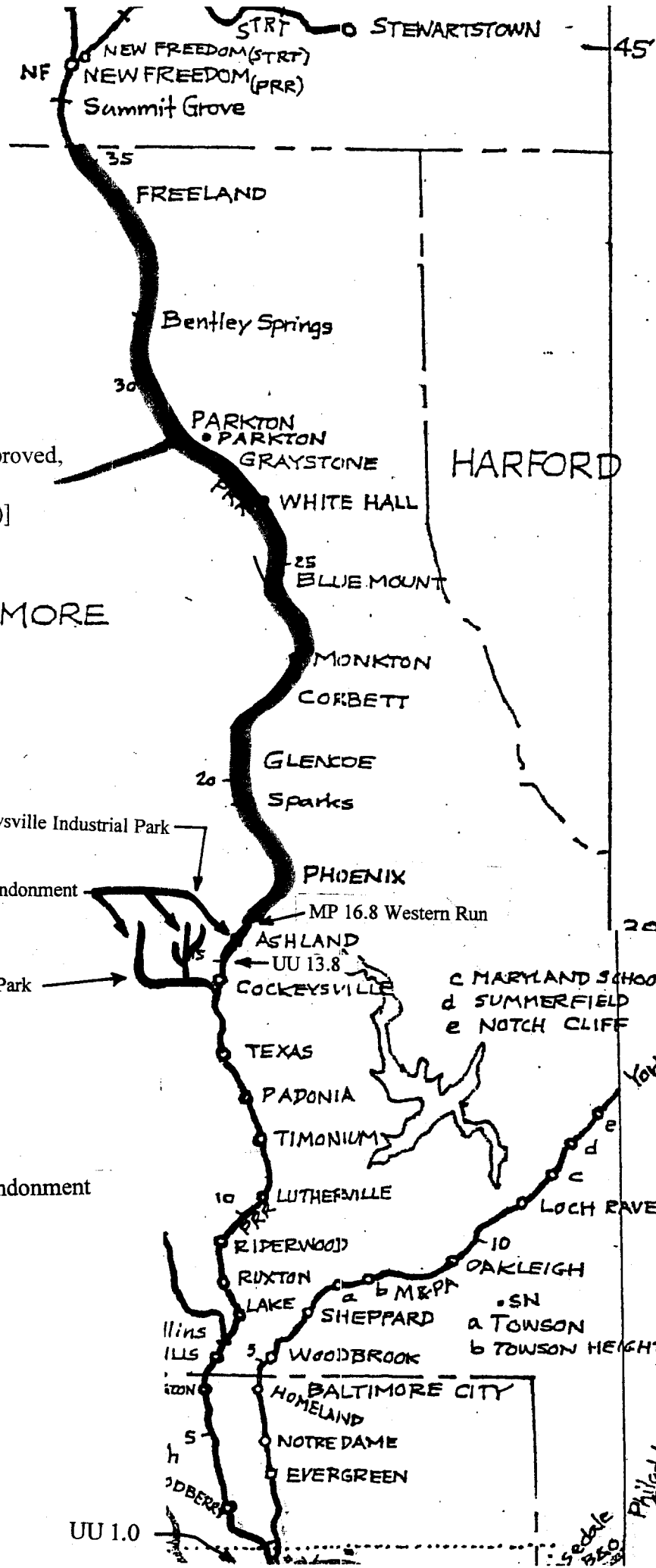

James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2006, a copy of the foregoing Motion of James Riffin for a Preliminary Determination, was served by first class mail, postage prepaid, upon James R. Paschall, Senior General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241.



James Riffin



Line proposed, but not approved,
for abandonment.
[AB 5 Sub 106 (9/11/72)]

Line never proposed for abandonment

Petition Line proposed for abandonment

UU 1.0

Philadelphia
Baltimore